

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RICHARD E. GRAY AND	:	
JEAN M. GRAY	:	DETERMINATION
	:	DTA NO. 808982
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987 and 1988.	:	

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Petitioners, Richard E. Gray and Jean M. Gray, 12 Railroad Vine, Amelia Island, Florida 32034, filed a petition for redetermination of a deficiency of for refund of personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 9, 1992 at 9:15 A.M. Petitioners filed a brief and reply brief on December 31, 1992 and February 23, 1993, respectively. The Division of Taxation filed a letter in lieu of a brief on February 1, 1993. Petitioners appeared by Peter L. Faber, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether petitioners were resident individuals of New York State in 1987 and 1988.

FINDINGS OF FACT

Petitioners, Richard E. Gray and Jean M. Gray, were domiciled in New York State until at least September 1985.

In 1987 and 1988, petitioners filed New York State nonresident personal income tax returns. The returns filed for those years show Florida State mailing addresses. Upon audit of those returns, the Division of Taxation ("Division") determined that petitioners were domiciliaries of New York in 1987 and 1988; therefore, they were required by the Division to file personal income tax returns as residents of New York, calculating their income tax

accordingly. The Division issued statements of audit adjustment to petitioners recalculating their 1987 and 1988 New York income and tax due thereon in accordance with this determination.

Based on the results of its audit, the Division issued to petitioners a Notice of Deficiency dated November 26, 1990, asserting deficiencies in income tax in the amounts of \$779,360.50 for 1987 and \$60,400.13 for 1988.

As a child, Mr. Gray moved with his family to Fayetteville, New York and later moved to Syracuse. Except for periods of schooling and military service, he lived in the Syracuse area most of his life. He is a graduate of Syracuse University and an avid supporter of the Syracuse football team. In 1952, Mr. Gray went to work for a company started by his father called Gray-Syracuse, Inc.

Gray-Syracuse is a precision casting corporation which focuses primarily on the aerospace industry. Before 1985, Mr. Gray owned 80 percent of the common stock and was the chairman of the board of Gray-Syracuse. The remainder of the stock was owned by key employees hired by Mr. Gray to run the corporation. The corporation has manufacturing facilities in Manlius and Chittenango, New York. It also acquired two industrial plants, one in Troy and one in Oriskany, New York. Mr. Gray personally owned the property upon which Gray-Syracuse's primary facilities were located. He also purchased 48 acres of land as a site for a proposed manufacturing plant. The land was never zoned for industrial purposes, however, so the plant was never built. It remains vacant land and is still held by Mr. Gray.

In about 1970, Mr. Gray began relinquishing direct control over the operations of the corporation, appointing Robert Barbero as president. Over time, he handed over the day-to-day management of the corporation to Mr. Barbero. As his participation in the corporation declined so did his compensation until Mr. Gray was compensated less for his services than was Mr. Barbero. In the 1970's, Mr. Gray rented a separate office for himself in Manlius, New York to remove himself from the plant premises because he believed his presence would undermine Mr. Barbero's authority. In his personal office, he conducted business connected with Gray-

Syracuse and with two other corporations in which he had an ownership interest: Alcumet, Inc., a New Hampshire foundry specializing in aluminum and copper base metal, and Finite Tools, a tool company formed in Georgia in 1983.

Mr. Gray has suffered severe health problems for some time, especially respiratory and heart ailments. In 1981, he was diagnosed as having arrhythmia, a heart condition which can cause sudden blackouts and, if untreated, can lead to death. In May 1981 he was involved in a minor automobile accident after falling unconscious behind the wheel. After that, he continued to experience episodes of lightheadedness. In June 1983, he experienced a loss of consciousness while sitting at his office desk. Because of these experiences, Mr. Gray stopped driving an automobile for a period of about five years.

Also in 1981, Mr. and Mrs. Gray were involved in an almost fatal automobile accident while driving from Sacramento to San Francisco. Following this accident, key employees of Gray-Syracuse approached Mr. Gray and asked him what would happen to them in the event of Mr. Gray's death. Prompted by concerns for his own health and for the well-being of his employees, Mr. Gray began planning for retirement and for the orderly transition of the corporation to new ownership.

In the early 1980's, the Grays began visiting different locations looking for a place with a suitable climate that would allow Mr. Gray to exercise year round. They visited California, New Mexico, North and South Carolina, Georgia and Florida. Initially, they decided to settle on Skidway Island in Georgia. In January 1984, they purchased a residential plot with the intention of building a home there; however, their home design was rejected by the local architectural review committee. By August of 1985, the Grays realized that they would need to rent housing until they were able to resolve their differences with the review committee. They elected to rent on Amelia Island, Florida because there is a major airport nearby which would allow them to commute to Skidway Island on a regular basis to negotiate their differences with the review committee.

In August 1985, Mrs. Gray met with George Dahl, a realtor, who showed her available

housing on Amelia Island. Eventually, they settled on a three-bedroom condominium located at 2201 Linkside Villa, Amelia Island. They executed a one-year lease from November 1985 through November 1986 with an option to renew. At some point in the fall of 1985, petitioners realized that they would never resolve their differences with the architectural review board of Skidway Island, and they then began searching for a permanent residence on Amelia Island.

Letters from two realtors confirm that by the fall of 1985 petitioners began looking for a home to purchase on Amelia Island. By the fall of 1986, the Grays still had not found what they were looking for. On October 3, 1986, the Grays signed an agreement to acquire Lot No. 44, Railroad Vine, Amelia Island Plantation, with the intention of building a new home. The acquisition of Lot No. 44 was completed on November 4, 1986, and the Grays immediately began planning for the design of the new house.

In the meantime, the Grays continued to rent housing on Amelia Island. When the lease at Linkside ended, they did not exercise the option to renew because of a disagreement with the owner of the property. Instead, they leased a second three-bedroom condominium at 2095 Beachwood, Amelia Island Plantation from December 1986 through May 1987. The term was for less than a year because the owner had a prior arrangement to rent it to other tenants.

The Grays spent the summer of 1987 in Syracuse, New York and leased no property in Florida from June through September 15, 1987. They leased a three-bedroom apartment at 22 Wax Myrtle, Amelia Island Plantation from September 15, 1987 through October 1988. The Grays spent the summer of 1988 in Florida. Mr. Gray found the Florida heat and humidity to be extremely oppressive and determined not to repeat the experience.

The design, planning and construction of the Grays' new house stretched from November 1986 through at least December 1988. The original architectural design was rejected by the Amelia Island Plantation Architectural Review Board in December 1986 and had to be revised. The final plans were not approved until June 1987. The construction contract was then let out for bid. A final contract was signed in October 1987. The Grays actively participated in overseeing the design and construction of their new home. They moved into their new

residence on December 15, 1988, although the house was only partially complete and swaddled in scaffolding.

When the Grays began planning to move to a warmer climate, they initially thought they would sell their Fayetteville home. They changed their minds for two reasons. One of their children was (and continues to be) unable to keep a steady job because of physical ailments and addictions to drugs. The Grays felt obligated to maintain a home for her, at least until she was able to care for herself. In addition, the Grays decided, as part of their estate planning, that it would be prudent to turn the Fayetteville house over to their children, allowing them to hold it as an investment.

The Grays have five children. Mr. Gray has three children by a prior marriage: Christina, who lives near Syracuse; Stephen who lives in Colorado; and Andrea, who lives in Vermont. Mrs. Gray has two children, also by a prior marriage, Warren and Susan Murphy. Only Susan remains in Syracuse. Late in 1986, legal preparations were begun to effectuate the transfer of the Fayetteville house to the five children. On January 26, 1987, the children formed the partnership Gra-Mur Real Estate Co. ("Gra-Mur"). At that time, the the home was valued at approximately \$240,000.00. In February 1987, the Grays gave each child an 8-1/3 percent interest in the Fayetteville house. They gave an additional eight and one-third percent interest to each child in November 1988. The remaining interest was transferred to the children in May 1989. The Grays elected to transfer the property to their children in this manner in order to take advantage of federal and New York State gift tax exemptions. Had they transferred the property without thought to the tax consequences, they would have transferred the property to their children all at once.

The Grays rented (and continue to rent) the Fayetteville house from Gra-Mur on a year-round basis. They do so in order to provide themselves with a summer home away from the oppressive Florida heat. During part of the period in issue, the Grays also provided year-round housing for one of their daughters.

The Fayetteville house was appraised again in March 1987 and had a value at that time

of approximately \$300,000.00. It has approximately 3,200 square feet. It is furnished with rather heavy antique furniture, appropriate to a northern climate. When the Grays moved to their newly-built house in Florida, they purchased all new furniture suitable for the Florida climate and the style of the new house. The Florida house has approximately 3,400 square feet. Glass windows are used throughout the structure, including ceilings and walls, and there are extensive plantings. Construction costs were approximately \$619,000.00.

In 1981, when he first began thinking about retirement, Mr. Gray entertained several plans for extricating himself from Gray-Syracuse. He initially considered having his son, Stephen Gray, assume ownership and management control of the corporation. When Stephen expressed no interest, Mr. Gray considered a sale to the employees through a stock option plan, but this proved not to be feasible. Finally, Mr. Gray considered a sale to third-party buyers.

In about 1984, Mr. Gray retained the Geneva Corporation, a business consulting firm, to establish a price for the business and later that year he consulted the firm of Peat, Marwick & Mitchell about his plans. Mr. Gray had definite ideas about the type of purchaser he was looking for. He was interested in finding a company that would share his views as to how the corporation would be managed. It was important to him that the corporation not be merged into another business, that it remain in New York State and that his key employees be offered the opportunity to purchase stock. Mr. Gray was approached by many companies interested in purchasing including, Steele Heddle, Waukesha Foundry, Chromalloy, and Sturm Ruger.

In late 1986, ESCO Corporation ("ESCO"), a Portland, Oregon corporation, expressed an interest in purchasing Mr. Gray's interest in Gray-Syracuse. Serious negotiations were begun late in 1986 after Mr. Gray determined that ESCO would be a suitable buyer. On August 12, 1987, Mr. Gray announced to the employees that ESCO was going to purchase Gray-Syracuse by September 15, 1987. Mr. Gray agreed to sell to ESCO his 80 percent stock ownership in the corporation and the real property and manufacturing facilities owned by him. He hoped that 20 percent of the common stock would continue to be owned by the corporation's key personnel. Towards that end, Mr. Gray retained some of his holdings until other key employees became

eligible to be shareholders. The shares retained by Mr. Gray were intended to create a pool from which key personnel could purchase shares, with ESCO always retaining 80 percent of the outstanding common stock. Some Gray-Syracuse employees elected to sell shares of stock they already owned, and in the end, Mr. Gray retained eight or nine percent of the common stock as a minority shareholder. Mr. Gray was asked by ESCO to serve on the Gray-Syracuse board of directors, and he did so without compensation until sometime in 1990.

Although Mr. Gray was not actively involved in the day-to-day management of Gray-Syracuse, he participated in running the corporation up until its sale in September 1987. As he stated:

"I was deeply, deeply involved, but not on an operating level. So therefore, in the time frame of 1987, I had to maintain bank relations and relations within the business community of Syracuse; it was vital to the health of the company." (Tr., p. 140.)

In 1987, Mr. Gray received salary and wages from Gray-Syracuse in the amount of \$160,994.57. In 1988, he received wages and salary from Gray-Syracuse in the amount of \$59,790.00. Mr. Gray described this as a bonus earned in 1987 but paid in 1988. The wage and tax statements issued to Mr. Gray show a Florida address, and he credibly testified that he sometimes conducted business related to Gray-Syracuse from his residence in Florida.

Throughout 1987 and 1988, Mr. Gray retained his office in Manlius, New York, where he conducted business in connection with Alcumet and Finite Tools and looked after his personal financial interests. Until Gray-Syracuse was sold in 1987, he also conducted business on behalf of that corporation from the Manlius office.

As a life-long resident of the Syracuse area and a successful businessman, Mr. Gray had extensive business, social and civic ties in the Syracuse community. He was the treasurer of the Manufacturers Association of Central New York for approximately 10 years and also served as president of that organization. He was a member and past president of the Citizen's Foundation and a member of the Metropolitan Development Association and the Employer's Support for the Guard and Reserve. By the end of 1986, Mr. Gray had resigned from all of these organizations. He rejected invitations to serve on the boards of several community organizations in New York

because he knew that he was moving to Florida. In 1987 and 1988, Mr. and Mrs. Gray continued their memberships in two Syracuse social organizations, the Onondoga Golf Club and the Century Club. In addition, Mr. Gray continued his membership in the Orange Pack, an organization for boosters of the Syracuse University football team.

Beginning in 1985, Mr. and Mrs. Gray's pattern of charitable contributions shifted from New York to Florida. In 1985, the Grays made no contributions to Florida charitable organizations, while making substantial donations to organizations in New York and elsewhere. By 1988, the Grays' New York contributions were confined primarily to Syracuse University and the Orange Pack. The bulk of their charitable contributions were made to Florida organizations. Mrs. Gray became a member of St. Michael's, a Florida church, in 1985 and began making contributions to that church in 1986. In 1986, the Grays began contributing to the United Way of Northeast Florida, and by 1988 they were contributing to six different Florida organizations.

On September 9, 1985, Mr. Gray executed a Declaration of Domicile and Citizenship in Nassau County, Florida, stating, in part:

"I have changed my domicile to and am . . . a bonafide resident of the State of Florida since NINTH day of SEPTEMBER, 1985, and I reside at 2201 BEACHWOOD ROAD, FERNANDINA, NASSAU County, Florida . . . ."

Mrs. Gray registered a motor vehicle in Florida on November 26, 1985. Both of the Grays were issued Florida driver's licenses on November 27, 1985. The Grays registered to vote in Florida on February 20, 1986. By separate letters dated March 11, 1986, Mr. and Mrs. Gray requested that the Onondoga, New York Board of Elections remove their names from the voter records. On March 10, 1986, Mr. Gray executed a living will declaring the Fernandina address as his residence. A Florida Vessel Certificate of Title was issued to Jean M. Gray on October 7, 1988. Mr. and Mrs. Gray obtained passports issued in Miami on December 4, 1986.

In the years after 1986, the Grays joined several Florida organizations. Mrs. Gray joined the Plantation Ladies Association in 1986, and Mr. and Mrs. Gray became members of the Pelican Club of Fernandina Beach, Florida early in 1987. Mr. Gray has been an active member



of a discussion group called The Breakfast Club since October of 1985. Membership in the group is limited to 25 men who must be permanent residents of Amelia Island, Florida in order to participate. In June 1988, the Grays joined the Council of 100 in Nassau County, Florida, a group dedicated to establishing and supporting an active Republican Party in that part of Florida. The Grays renewed their membership in a Florida branch of the American Automobile Association in June 1987, indicating that they were members before that time.

Beginning in March 1986, Mr. Gray began writing to Florida elected officials on both the state and Federal level to communicate his opinion with regard to issues of concern to him. He consistently identified himself as a Florida resident.

The Grays started seeing a Florida dentist in 1986. Beginning in 1987, they also established ties with Florida doctors. All of their medical records were transferred to Dr. Farid Ullah of Fernandina Beach, Florida in 1987. Mr. Gray consulted with an athletic physician when he was in New York in 1986, but he has not returned to New York for medical treatment of his heart condition since before 1987. The Grays still maintain a relationship with a doctor in Syracuse.

In September 1985, Mr. Gray opened a brokerage account at Merrill Lynch's Fernandina Branch. In November 1985, he opened a checking account with the Barnett Bank of Florida with an initial deposit of \$10,000.00. Shortly thereafter, he obtained a Visa card from the Fernandina Branch of the Barnett Bank. Throughout 1987 and the greater part of 1988, Mr. Gray also maintained accounts with Prudential-Bache of Syracuse and the Seneca Federal Savings and Loan Association of Manlius, New York. He also had brokerage accounts with Wright Investors' Service of Bridgeport, Connecticut, Bear Stearns of New York and New Mexico Capital Management in Albuquerque, New Mexico. He had investments in limited partnerships located in Salt Lake City, Utah.

Mr. Gray continues to own a 48-acre parcel in the Syracuse area which he purchased with the thought of someday building a manufacturing plant. Mrs. Gray has a first mortgage on a house located in the Syracuse area originally owned by herself and her former husband.

By Mr. Gray's count, the Grays spent 183 days in Florida and 145 days in New York in 1987; in 1988, they spent 266 days in Florida and 67 days in New York. Days in and out of New York were substantiated by voluminous records including: telephone bills, credit card receipts, bank withdrawal receipts, doctor and dentist bills, Amelia Island Plantation Club charges and expense accounts. In addition, Mr. Gray offered in evidence a contemporaneous log showing his whereabouts on a daily basis. Mr. Gray completed the log, usually on a weekly basis, although some entries are made daily and some every few days. Mr. Gray credibly testified as to his whereabouts on days not accounted for by documentation other than the log. Primarily, these were days spent in Florida, and documentary evidence was offered to establish the Grays' presence in Florida on the day immediately preceding and the day following the day for which testimony was offered.

The Grays spent more time in New York in 1987 than they would have liked. One of their daughters had legal and medical problems which forced the Grays to return to Syracuse on several occasions.

Sometime in December of 1983 or January of 1984, the Grays consulted with their attorney regarding the appropriate steps to take to carry out their intention to change their domicile from New York. At that time, they intended to change their domicile to Georgia. When they moved to Amelia Island, they were prepared to execute formal declarations in order to change their domicile to Florida, and they did so.

#### CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines a resident individual as follows:

"Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. The Commissioner's regulations (20 NYCRR former 102.2[d]<sup>1</sup>) provide guidance in making a determination of domicile.

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

"(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

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"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the

length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). The test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 246, 41 NYS2d 336, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785; see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change in domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (Matter of Newcomb,

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<sup>1</sup>20 NYCRR 102.2 was renumbered without significant change as 105.20, as of January 13, 1992, effective January 29, 1992.

192 NY 238, 250). The Division maintains "that the New York contacts must essentially be terminated for life-long residents, like the Grays, to prove a change of domicile" (Division's Letter Brief, p. 1), but cites no legal authority for this proposition. There is ample precedent holding otherwise (see, e.g., Matter of Doman, Tax Appeals Tribunal, April 9, 1992; Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). The Division also suggests that a change in domicile can never be established where the record establishes that the change was motivated by financial considerations. This is simply incorrect. As the court stated in Matter of Newcomb:

"[E]very human being may select and make his own domicile . . . . Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and acts of the person affected confirm the intention." (Matter of Newcomb, *supra* at 251; emphasis added.)

Motivated by a desire to lower his tax burden, a New York domiciliary may nonetheless form an absolute, fixed and sincere intention to abandon his New York domicile and then act on that intention. The motive is irrelevant, as long as the acts of the person claiming the change of domicile confirm the intention. Moreover, in this case, there is substantial evidence that the Grays were motivated by more than financial considerations. Mr. Gray provided extensive documentation regarding his medical condition and credibly testified that he decided to retire to a warmer climate to maintain his health early in the 1980's. Mr. Gray also was motivated by a desire to sell his interest in Gray-Syracuse while he could still personally negotiate terms of the sale and affect the future of that company. In short, several different factors came together in the early 1980's which convinced the Grays that the time had come to make a change in their general habit of living.

C. The record shows that in the fall of 1985, the Grays formed an intention to change their domicile from New York to Florida. They rented a large condominium unit, executing a one-year lease for the period November 1, 1985 to November 1, 1986. Through Florida realtors they began actively looking for a house to purchase on Amelia Island. Based, at least in part, on

the advice of their attorney, they obtained Florida driver's licenses, registered an automobile in Florida and, in February 1986, registered to vote in Florida. On September 9, 1985, Mr. Gray executed a declaration of Florida domicile. Although these formal declarations of domicile are not determinative of a change of domicile, they do provide some evidence of intent and, for that reason, are not irrelevant (see, Matter of Trowbridge, 266 NY 283, 289; Matter of Silverman, Tax Appeals Tribunal, June 8, 1989).<sup>2</sup> The crucial question in this case is not whether the Grays intended to change their domicile but when their intent became actual.

D. It appears that in the Grays' case a change of domicile was not effectuated all at once; rather, there was a period of transition during which time the Grays gradually cut their ties with New York while forming bonds of association with Florida. There is no question that by the time the Grays moved into their newly-built Florida home in December 1988 they were no longer domiciled in New York. By that time, they had transferred a majority interest in their Fayetteville home to their children; Mr. Gray had sold his interest in Gray-Syracuse and was no longer an employee of that corporation; the Grays had joined social and civic organizations in Amelia Island, indicating that they were integrated into that community; and the Grays were spending much more time in Florida than in New York. Petitioners, however, claim that their change of domicile was complete by

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<sup>2</sup>The Division makes the following observations in a letter stating its position in this matter:

"It is interesting that the Grays consulted their attorney and accountant tax advisors before claiming a change of residency. Why would they have checked with tax advisors before moving if their motive was not financial? I doubt they would have checked with tax advisors if they truly had a heartfelt desire to make another state their home."

Thus, without quite saying so, the Division maintains that consultation with a tax advisor is evidence of dissimulation which undermines a claim of change of domicile. This is certainly not the case. It is no more than prudent for one seeking to make a change in his or her legal status to consult an attorney for advice. I cannot see how dishonesty or false motives can be attributed to a taxpayer on this ground.

the end of 1986. While I find this an extraordinarily difficult case to decide, I cannot find that petitioners abandoned their New York domicile in 1986. There are several factors that weigh against the Grays' assertion of a change of domicile by January 1, 1987.

The Grays spent almost as much time in New York in 1987 as they did in Florida (by their own accounting 145 days in New York versus 183 in Florida days). The Grays still held a majority interest in their Fayetteville home. From the end of May 1987 through September 15, 1987, petitioners were not leasing a residence in Florida. Their actual, and only, residence for June, July and August 1987 was in New York. The construction contract on their new home in Florida was not signed until October 1987. The Grays had severed many of their ties to New York by January 1987, but not one of the most significant links, Mr. Gray's association with Gray-Syracuse. Mr. Gray remained deeply involved in the affairs of Gray-Syracuse until its sale in September 1987. He was the chairman of the board and the majority stockholder. He negotiated the sale of Gray-Syracuse and continued to represent the corporation to the business community and financial institutions. He maintained an office in Manlius, New York where he actively conducted business on behalf of Gray-Syracuse. Mr. Gray was an employee of Gray-Syracuse and received a significant salary from Gray-Syracuse in 1987. All of these factors, especially Mr. Gray's continuing ties to his New York business, establish that the Grays did not abandon their New York domicile by January 1, 1987 (see, Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991).

The Grays' circumstances may profitably be compared with those of the petitioner in Matter of Clute v. Chu (106 AD2d 841, 484 NYS2d 239). The petitioner, a resident of Watkins Glen, New York, purchased a condominium in Naples, Florida and like the Grays joined a number of civic and social clubs in Florida while dropping his membership in New York organizations. Mr. Clute filed formal declarations of domicile in Florida; discontinued his safe deposit box in New York and opened one in Florida; opened a checking and savings account in Florida; paid Florida intangible tax; and affiliated with a church in Florida. The court confirmed the State Tax Commission's finding that Mr. Clute was a New York domiciliary.

The Commission's finding rested primarily on two factors. First, the Commission found that Mr. Clute had never abandoned his Watkins Glen home, where his wife and son continued to live, and used the Watkins Glen home more frequently than the Florida condominium. Second, the Commission found that Mr. Clute "spent a very considerable portion of his time in fulfilling his responsibility as a director in each of two banks located in New York State" (id., 484 NYS2d at 241). Likewise here, the Grays did not completely abandon their Fayetteville home (holding a majority ownership interest in that property until December 1988) where their daughter continued to live in 1987; they spent a considerable portion of their time in New York; and Mr. Gray was employed by and actively involved in the financial affairs of Gray-Syracuse.

On the other hand, the record clearly establishes that the Grays had formed an intention to establish a Florida domicile late in 1985 and took numerous concrete steps towards fulfilling that intention. Under these circumstances, it is difficult to select a precise date when intention and action came together. Considering all of the facts in the record, I find that with the sale of Gray-Syracuse on September 15, 1987, the Grays finally abandoned their New York domicile. By that time, most of the Grays' ties with New York were severed. Mr. Gray was no longer actively involved in Gray-Syracuse. He held no compensated position;<sup>3</sup> his stockholdings were less than 10 percent of the shares outstanding; and he was no longer actively involved in the company's financial affairs. Mr. Gray resigned from membership in most of the New York organizations he had previously belonged to. The Grays had rented a residence in Florida from September 15, 1987 through November 15, 1988, at which time they intended to move into their new home which was then in the process of construction. In short, by September 15, 1987 the Grays had severed their most substantial ties with New York and moved to Florida with the intention of remaining.

Two other factors raised by petitioners need to be addressed. First, petitioners made much of the fact that Mr. Gray was winding down his involvement in Gray-Syracuse for a long

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<sup>3</sup>Mr. Gray was paid a bonus in 1988, but the bonus was earned in 1987 and payable in 1988.

period of time prior to 1985. They pointed out that Mr. Barbero had actual day-to-day control of the company and that Mr. Barbero's salary exceeded that of Mr. Gray in 1987. While I found petitioners' evidence regarding these matters credible, I do not believe that they negate Mr. Gray's own active involvement in the financial affairs of the business. Finally, petitioners assert that they would have sold their Fayetteville family home were it not for estate planning considerations and their desire to maintain a living space for one of their daughters. I have no doubt of the truth of these assertions. However, I believe that these facts merely demonstrate how deeply rooted the Grays were in the Syracuse community. Thus, a lifetime of habits, personal

associations and affections appear to have kept the Grays tied to New York, perhaps longer than they would have liked.

E. Petitioners proved by clear and convincing evidence that they did not spend in the aggregate more than 183 days in New York in 1987 and 1988. The Division's contention that petitioners failed to carry their burden of proof in this matter is rejected.

The Division refers to 20 NYCRR former 102.2(c) as the basis for its claim that petitioners failed to establish the number of days spent in and out of New York. That regulation states, in pertinent part:

"Any person domiciled outside New York State who maintains a permanent place of abode within New York during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State."

Petitioners provided substantial documentary evidence of days spent in and out of New York, including a contemporaneous log kept by Mr. Gray, Amelia Island Plantation club charges, Visa credit card statements, telephone bills, and expense reports. In addition, Mr. Gray credibly testified to his whereabouts on each day for which documents, other than his personal log, were not offered (fewer than 30 days in 1987 and 45 days in 1988). Most of these were single days which fell between two documented days spent in Florida. The Division offered no



evidence of its own to refute the documents and testimony offered by petitioners. In fact, it is not clear from the Division's letter brief on what grounds the Division finds petitioners' proof wanting. In any case, the law is clear that a taxpayer may prove his whereabouts through a combination of documentary evidence and credible testimony, as petitioners have done here (see, Matter of Sutton, Tax Appeals Tribunal, October 11, 1990).

F. The petition of Richard E. Gray and Jean M. Gray is granted to the extent that it is held that they were not resident individuals of New York State after September 15, 1987; the tax deficiency computed by the Division for the year ended December 31, 1987 shall be recalculated accordingly; the deficiency calculated for the year ended December 31, 1988 shall be cancelled; and in all other respects, the petition is denied.

DATED: Troy, New York  
May 27, 1993

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE